(ii) 195,000 in fiscal year 2002;
(iii) 195,000 in fiscal year 2003; and
(iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H–1B visas and specifies the qualifications that are required for entry as an H–1B nonimmigrant ;

(3) Requires an employer seeking to employ H–1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H–1B status by the Immigration and Naturalization Service (INS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H–1B visa classification.* Before a nonimmigrant may be admitted to work in a ''specialty occupation'' or as a fashion model of distinguished merit and ability in the United States under the H–1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to DOL, and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The LCA (Form ETA 9035 or ETA 9035E) and cover page (Form ETA 9035CP, containing the full attestation statements that are incorporated by reference in Form ETA 9035 and ETA 9035E) may be obtained from http://ows.doleta.gov, from DOL regional offices, and from the Employment and Training Administration (ETA) national office. Employers are encouraged to utilize the electronic filing system developed by ETA to expedite the certification process (see § 655.720).

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (INS Form I–129), together with the certified LCA, to INS, requesting H–1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, INS are set forth in INS regulations. The INS petition (Form I–129) may be obtained from an INS district or area office.

(3) If INS approves the H–1B classification, the nonimmigrant then may apply for an H–1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H–1B, he/she may apply to the INS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H–1B visa classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§ 655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to ''H–1B nonimmigrant'' apply to any Mexican citizen nonimmigrant who is classified by INS as ''TN.'' In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106–95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

[65 FR 80209, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001]

§ 655.705 What federal agencies are involved in the H–IB program, and what are the responsibilities of those agencies and of employers?

Three federal agencies (Department of Labor, Department of State, and Department of Justice) are involved in the process relating to H–1B nonimmigrant classification and employment. The employer also has continuing responsibilities under the process. This section briefly describes the

responsibilities of each of these entities.

(a) *Department of Labor (DOL) responsibilities.* DOL administers the labor condition application process and enforcement provisions (exclusive of complaints regarding non-selection of U.S. workers, as described in 8 U.S.C. 1182(n)(1)(G)(i)(II) and 1182(n)(5)). Two DOL agencies have responsibilities:

(1) The Employment and Training Administration (ETA) is responsible for receiving and certifying labor condition applications (LCAs) in accordance with this subpart H. ETA is also responsible for compiling and maintaining a list of LCAs and makes such list available for public examination at the Department of Labor, 200 Constitution Avenue, NW., Room C–4318, Washington, DC 20210.

(2) The Wage and Hour Division of the Employment Standards Administration (ESA) is responsible, in accordance with subpart I of this part, for investigating and determining an employer's misrepresentation in or failure to comply with LCAs in the employment of H–1B nonimmigrants.

(b) *Department of Justice (DOJ) and Department of State (DOS) responsibilities.* The Department of State, through U.S. Embassies and Consulates, is responsible for issuing H–1B visas. The Department of Justice, through the Immigration and Naturalization Service (INS), accepts the employer's petition (INS Form I–129) with the DOL-certified LCA attached. INS is responsible for approving the nonimmigrant's H–1B visa classification. In doing so, the INS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H–1B visa classification. If the petition is approved, INS will notify the U.S. Consulate where the nonimmigrant intends to apply for the visa unless the nonimmigrant is in the U.S. and eligible to adjust status without leaving this country. See 8 U.S.C. 1255(h)(2)(B)(i). The Department of Justice administers the system for the enforcement and disposition of complaints regarding an H–1B-dependent employer's or willful violator employer's failure to offer a position filled by an H–1B nonimmigrant to an equally or better qualified United States worker (8 U.S.C. 1182(n)(1)(E), 1182(n)(5)), or such employer's willful misrepresentation of material facts relating to this obligation. The Department of Justice, through the INS, is responsible for disapproving H–1B and other petitions filed by an employer found to have engaged in misrepresentation or failed to meet certain conditions of the labor condition application (8 U.S.C. 1182(n)(2)(C)(i)–(iii); 1182(n)(5)(E)).

(c) *Employer's responsibilities.* Each employer seeking an H–1B nonimmigrant in a specialty occupation or as a fashion model of distinguished merit and ability has several responsibilities, as described more fully in this subpart and subpart I of this part, including—

(1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035 or Form ETA 9035E in the manner prescribed in § 655.720. By completing and submitting the LCA, and in addition by signing the LCA, the employer makes certain representations and agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions, and benefits to be provided to the H–1B nonimmigrants (8 U.S.C. 1182(n)(1)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. The LCA contains additional attestations for certain H–1B-dependent employers and employers found to have willfully violated the H–1B program requirements; these attestations impose certain obligations to recruit U.S. workers, to offer positions to U. S. workers who are equally or better qualified than the H–1B nonimmigrant(s), and to avoid the displacement of U.S. workers (either in the employer's workforce, or in the workforce of a second employer with whom the H–1B nonimmigrant(s) is placed, where there are indicia of employment with that second employer (8

U.S.C. 1182(n)(1)(E)–(G)). These additional attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. If the LCA is certified by ETA, notice of the certification will be sent to the employer, either by return FAX (where the Form ETA 9035 was submitted by FAX), by hard copy (where the Form ETA 9035 was submitted by U.S. Mail), or by electronic certification (where the Form ETA 9035E was submitted electronically). The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the Immigration and Naturalization Service in support of the Petition for Nonimmigrant Worker, INS Form I–129, for an H–1B nonimmigrant. See INS regulation 8 CFR 214.2(h)(4)(iii)(B)(*2*), which specifies that the employer will comply with the terms of the LCA for the duration of the H–1B nonimmigrant's authorized period of stay.

(2) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(3) The employer then may submit a copy of the certified, signed LCA to INS with a completed petition (Form I–129) requesting H–1B classification.

(4) The employer shall not allow the nonimmigrant worker to begin work until INS grants the alien authorization to work in the United States for that employer or, in the case of a nonimmigrant previously afforded H–1B status who is undertaking employment with a new H–1B employer, until the new employer files a nonfrivolous petition (Form I–129) in accordance with INS requirements.

(5) The employer shall develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

[65 FR 80210, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001]

§ 655.710 What is the procedure for filing a complaint?

(a) Except as provided in paragraph (b) of this section, complaints concerning misrepresentation in the labor condition application or failure of the employer to meet a condition specified in the application shall be filed with the Administrator, Wage and Hour Division (Administrator), ESA, according to the procedures set forth in subpart I of this part. The Administrator shall investigate where appropriate, and after an opportunity for a hearing, assess appropriate sanctions and penalties, as described in subpart I of this part.

(b) Complaints arising under section 212(n)(1)(G)(i)(II) of the INA, 8 U.S.C. 1182(n)(1)(G)(i)(II), alleging failure of the employer to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the Department of Justice, 10th Street & Constitution Avenue, NW., Washington, DC 20530. The Department of Justice shall investigate where appropriate and shall take such further action as may be appropriate under that Department's regulations and procedures.

[65 FR 80210, Dec. 20, 2000]

§ 655.715 Definitions.

For the purposes of subparts H and I of this part:

Actual wage means the wage rate paid by the employer to all individuals with experience and qualifications similar to the H–1B nonimmigant's experience and qualifications for the specific employment in question at the place of employment. The actual wage established by the employer is *not* an average of the wage rates paid to all workers employed in the occupation.